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Supreme Court, U.S.
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No. 91-

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

RUDY YUJEN TSAI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

To establish "willfulness," the scienter element under the criminal provisions of the Arms Export Control Act, does the government have to prove knowledge that a license is required to export the item in question, or does it merely have to prove knowledge that the export is illegal?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Rudy YuJen Tsai, and the United States). TRT International Corp., Tommy Tsai, and David Rosen were initially codefendants in the district court, but none were parties to the direct appeal and none is a party to this petition.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

INDEX TO APPENDIX iii

TABLE OF AUTHORITIES iv

PETITION

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

a. Procedural History 4
Statement Under Rule 14.1(i) . . 8

b. Statement of Facts 9

REASONS FOR GRANTING THE WRIT

The decision below perpetuates a circuit conflict on the definition of the scienter element under the Arms Export Control Act, and conflicts with this Court's precedent on the importance of accuracy in supplemental instructions responding to questions from the deliberating jury. 14

CONCLUSION 41

INDEX TO APPENDIX

A. Opinion of the Court of Appeals

B. Judgment of the Court of Appeals

C. Order Denying Rehearing

D. Order Staying Mandate

TABLE OF AUTHORITIES

CASES

Bollenbach v. United States,
326 U.S. 607 (1946) 25, 26

Liparota v. United States,
471 U.S. 419 (1985) 28

United States v. Adames, 878 F.2d 1374
(11th Cir. 1989) 16, 33

United States v. Beck, 615 F.2d 441
(7th Cir. 1980) 16, 30, 31, 39

United States v. Cahalane, 560 F.2d 601
(3d Cir. 1977), cert. denied,
434 U.S. 1045 (1978) 32n

United States v. Cheek, 498 U.S. --,
112 L.Ed.2d 617 (1991) 28, 33

United States v. Davis, 583 F.2d 190
(5th Cir. 1978) 16, 33

United States v. Duncan, 850 F.2d 1104
(6th Cir. 1988) 24

United States v. Gregg, 829 F.2d 1430
(8th Cir. 1987) 16, 32n

United States v. Jamil, 707 F.2d 638
(2d Cir. 1983) 33, 34

United States v. Lizarraga-Lizarraga,
541 F.2d 826
(9th Cir. 1976) 16, 31, 32, 33

United States v. Malsom, 779 F.2d 1228 (7th Cir. 1985) 31

United States v. Murphy, 852 F.2d 1 (1st Cir. 1988), cert. denied, 489 U.S. 1022 (1989) 16, 30, 31, 39

United States v. Smith, 918 F.2d 1032 (2d Cir. 1990) 16, 35

STATUTES AND RULES:

18 U.S.C. § 371 5
18 U.S.C. § 3231 8

22 U.S.C. § 2778 ..... 5, 14, 17, 27, 28

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1291 8-9

22 C.F.R. §§ 121.1, 121.8, 123.1, 127.1(a) and 127.3 5

Fed.R.App.P. 4(b) 9
S.Ct. Rules 13.1, 13.4 (1990 rev.) 2

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RUDY YUJEN TSAI respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on January 21, 1992, affirming his convictions in the Eastern District of Pennsylvania under the Arms Export Control Act.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, filed on January 21, 1992, is published as United States v. Tsai, 954 F.2d 155 (3d Cir. 1992). It is Appendix A to this petition. There is no published opinion of the District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the petitioner's convictions but remanding for resentencing was entered on January 21, 1992. Appendix B. A timely petition for rehearing was denied on March 17, 1992. Appendix C. This petition is filed within 90 days of that date. Rules 13.1, 13.4 (1990 rev.). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Arms Export Control Act, 22 U.S.C. § 2778, provides, in pertinent part:

> **(c) Criminal violations; punishment.** Any person who willfully violates any provision of this section ..., or any rule or regulation issued under [this] section ... shall upon conviction be fined for each violation not more than $1,000,000 or imprisoned not more than ten years, or both.

The incorporated statutory provision, as applied to this case, states, in relevant part:

> **(a) Presidential control of exports and imports of defense articles and services, ... etc.; designation of the United States Munitions List;** .... (1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purpose of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.
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> * * * *
>
> **(b) Registration and licensing requirements for manufacturers, exporters, or importers of designated defense articles and defense services; exceptions.**
>
> * * *
>
> (2) Except as otherwise specifically provided in regulations issued under

> subsection (a)(1), no defense articles or defense services designated by the President under subsection (a)(1) may be exported ... without a license for such export, issued in accordance with this Act and regulations issued under this Act, except [for government-sponsored transactions].

22 U.S.C. § 2778.

STATEMENT OF THE CASE

This petition arises from a case involving a conspiracy to export alleged missile components to Taiwan without the required license.

a. Procedural History

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner Rudy Tsai was convicted on May 11, 1990, of all four counts in an indictment charging conspiracy from in or about March 1987 to in or about July 1989, in violation of 18

U.S.C. § 371, and unlicensed exportation of certain missile components to Taiwan, Republic of China, contrary to 22 U.S.C. §§ 2778(b)(2) and 2778(c) (the Arms Export Control Act, or "AECA") and 22 C.F.R. §§ 121.1, 121.8, 123.1, 127.1(a) and 127.3 (the "Munitions List"). Trial lasted four days.[1] During deliberations, the jury asked for clarification of the knowledge and willfulness requirements of the statute, and the judge gave supplemental instructions.

On March 4, 1991, after a hearing with witnesses, as well as argument and

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1. Codefendant David Rosen pleaded guilty and became a witness for the government. Codefendant Tommy Tsai, the petitioner's brother, was in Taiwan at the time the indictment was returned and has not been apprehended. On March 21, 1990, the trial court granted the government's motion to dismiss the indictment as against TRT International Corp. Accordingly, Rudy Tsai, the petitioner, went to trial alone.

allocution, the lower court imposed sentence, with a statement of reasons. On Counts Three and Four, substantive AECA counts arising after the effective date of the Sentencing Reform Act, the court imposed 87 months' (seven years, three months) imprisonment.[2]

On appeal, the Third Circuit affirmed the convictions, but vacated and remanded for resentencing. Appendix A, published at 954 F.2d 155. The panel opinion (per Becker, J., with Scirica & Roth, JJ.) appeared to agree with the argument advanced by the petitioner that the instruction given initially by the district court -- demanding proof that

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2. On Count One (conspiracy) the sentence was three years' supervised release to follow the imprisonment. On Count Two, the only "old law" (pre-guidelines) count, the court suspended imposition of sentence without more. The lower court also imposed four $50 special assessments, but no fine or restitution.

the defendant knew a license was required to export the item in question -- was correct, and "might have" been "better" than that given in response to the juror's question. Appx. A, at 16; 954 F.2d at 162. The panel found no "functional difference between the two charges," id., however, and therefore affirmed the convictions.[3]

The appellate court upheld the sentencing judge's assignment of a base offense level higher than that urged by the petitioner, but agreed that an upward departure beyond the sentence called for under that elevated guideline was not warranted. In addition, the court agreed that the petitioner had been denied a

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3. On appeal, the petitioner also challenged the sufficiency of the evidence to convict on Count Three. Although he adheres to that position, he does not press the point as a basis for certiorari review.

two-level downward adjustment for his below-average role in the offense on a legally erroneous basis. Accordingly, the court vacated the sentence and remanded for resentencing. Appx. A, at 25-28; 954 F.2d at 166-67. Rehearing was denied. Appx. C.

On March 23, 1992, the court of appeals (Becker, J.) granted a stay of mandate, so that the petitioner could pursue his challenge to his convictions through this petition without first undergoing the resentencing ordered by the court of appeals. Appx. D.

Statement Under Rule 14.1(i). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The jurisdiction of the court below rested upon 28 U.S.C. §

1291 and was timely invoked by Notice of Appeal filed within ten days of the entry of the initial judgment of sentence. Fed.R.App.P. 4(b).

b. Statement of Facts

The underlying facts developed at petitioner's trial are set forth in the Third Circuit's Opinion on the direct appeal. Appendix A, at 4-8; 954 F.2d at 158-59. For present purposes, the facts may be summarized as follows.

In late 1986, the appellant's brother, Tommy Tsai, and David Rosen, the President and Vice-President/Engineer respectively of TRT International Corporation (TRT), of Boston, Massachusetts, contacted a company in New Jersey about obtaining DSU-15 optical receivers. They were referred to Pennsylvania Optical (Penn Optical), a company in Reading,

Pennsylvania. In March, 1987, Penn Optical sold ten DSU-15 optical receivers to TRT. The DSU-15 is a prism used in the proximity fuse for the U.S. Air Force's Sidewinder missile. TRT shipped the DSU-15 optical receivers to Taiwan's Chung-Shan Institute of Science and Technology. Rosen testified that Rudy Tsai handled the DSU-15 optical receiver deal and that he, Rosen, acted under Rudy Tsai's direction. Later in 1987, TRT attempted to purchase three infra-red domes from Penn Optical. These domes were similar but not identical to those used on one model of the U.S. Navy's Maverick missile. Penn Optical contacted the State Department and gave the domes instead to Customs officials.

An undercover Customs Service agent delivered the three infra-red domes to TRT on November 22, 1988. Petitioner

testified that he shipped these three domes to Taiwan. On January 31, 1989, another undercover Customs Agent delivered an additional DSU-15 optical receiver to TRT, sent by Penn Optical to the petitioner. His girlfriend was planning to go back to Taiwan and would take the receiver, or attempt to take it, to Taiwan in her purse.

An official of the Office of Defense Trade Control testified that both an optical receiver assembly and an infra-red dome would require an export license from the Department of State prior to being sent to Taiwan. No TRT official had applied for or received such an export license.

The Vice President of Operations of Penn Optical testified that it was not clear what documentation was required to ship the DSU-15 optical receivers to

Taiwan. Similarly, the national sales manager for Penn Optical testified that he told various people at TRT that it was their responsibility to determine whether there was an export requirement for the infra-red domes, but he did not tell that to the petitioner. This witness also believed that the dome, being of unique design, was not part of a U.S. military weapon system and therefore needed no exporting authority.

Evidence of the petitioner's knowledge of the need for an export license for the optical receivers and infra-red domes was ambiguous. He knew of export license requirements in general, and also knew that export licenses were required for many military items that his company exported. David Rosen testified that he, Rosen, knew export licenses were needed for infra-red domes, although an official

at Pennsylvania Optical had said otherwise, and discussed this with the petitioner, who said that he and his brother, Tommy Tsai, would take care of it.

In essence, the petitioner testified at trial that he had no involvement in or knowledge of the transaction charged in Count Two. As for the infra-red domes (Count Three), he did not know whether these items required a license and believed that the Customs service would return them if they were not exportable, as the package was clearly and accurately labeled "I/R Domes." As to Count Four, he denied that the last DSU-15 was ever exported. Accordingly, he also denied that he conspired as charged in Count One to violate the law.

Although the petitioner was born in Taiwan, he is and was at all times

material to this case an American citizen.

REASONS FOR GRANTING THE WRIT

The decision below perpetuates a circuit conflict on the definition of the scienter element under the Arms Export Control Act, and conflicts with this Court's precedent on the importance of accuracy in supplemental instructions responding to questions from the deliberating jury.

The panel found no plain error in the district court's supplemental jury instruction, in which the trial judge altered the instruction on the willfulness element of the offense charged under 22 U.S.C. § 2778(c). The panel appeared to agree with the appellant that the instruction given initially by the district court -- demanding proof that the defendant knew a license was required to export the item in question -- was correct, and therefore "might have" been

"better" than that given in response to the juror's question. Appx. A, at 16; 954 F.2d at 162. The panel found no "functional difference between the two charges," id., however, and therefore affirmed the convictions. This resolution of the issue overlooked the key point -- that one version comports with the statutory language while the other does not -- and disregards the difference the change of language could have made on the facts of this case.

The court below did not say explicitly what scienter it believed to be required for this offense. The Circuits are split on that important question. The decision below cites only the opinions of those Circuits which hold that knowledge of any illegality is sufficient, ignoring the cases from the larger number of Circuits in support of

the petitioner's view of the scienter element, under which knowledge that the item in question required a license for exportation is required. Compare United States v. Beck, 615 F.2d 441 (7th Cir. 1980), and United States v. Murphy, 852 F.2d 1, 7 (1st Cir. 1988), cert. denied, 489 U.S. 1022 (1989), cited by the court below (Appx. A, at 16; 954 F.2d at 162), with United States v. Smith, 918 F.2d 1032, 1037-38 (2d Cir. 1990); United States v. Adames, 878 F.2d 1374, 1377 (11th Cir. 1989); United States v. Gregg, 829 F.2d 1430, 1437 & n.14 (8th Cir. 1987); United States v. Davis, 583 F.2d 190, 193 (5th Cir. 1978); United States v. Lizarraga-Lizarraga, 541 F.2d 826, 827-29 (9th Cir. 1976). This Court should grant certiorari and address the AECA mens rea issue, reversing the judgment below.

The criminal provision of the Arms Export Control Act, 22 U.S.C. § 2778(c), prohibiting unlicensed exportation of items on the "Munitions List," expressly requires for conviction that the violation must have been "willful." Prior to the commencement of trial, both defense counsel and the government filed in the district court requested jury instructions on the meaning of the term "willful" as used in that subsection of the Act. The petitioner's requested instruction Number 12 reads:

> The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.
>
> An act or failure to act is "knowingly" done, if done voluntarily and

> intentionally, and not because of mistake or accident or other innocent reason.

The government's supplemental instruction Number 12 stated that to establish that an act was done willfully and knowingly, for purposes of the AECA, the government need not show that the defendant knew he needed or lacked an export license, or was aware of or had consulted the licensing provisions of the AECA; according to the requested instruction, all that would be necessary to show is that the defendant was aware of a legal duty not to export the particular article.

On the element of willfulness, the trial judge chose not to give the instruction requested by the government, that it need not be proven that the defendant knew he needed an export

license.[4] Instead, the court explained:

> [L]astly [of four elements of the offense of violating the AECA on which the judge instructed], that the defendant acted knowingly and willfully. Let us go over those elements. Let me say first that, and I have told you this already, an act is done willfully if it is done voluntarily and intentionally and with the specific intent of disobeying or disregarding the law. An act is done knowingly if it is done voluntarily and intentionally, and not by mistake, accident, or for some innocent reason. Intent may be proven by express statements of the defendant, or it may in a proper case be inferred such as if the scheme made use of subterfuge or clandestine methods. So, when it comes to intent, there is a requirement that the defendant act knowingly and willfully. Now, there is no machine I know of that you can put on somebody's head, and look into their head and see what their intent was. We do not have an X-ray machine that can do that. But you are permitted to infer what someone's intent was from all of the facts, and you do that by considering the facts. As I said, you may consider if the defendant said that he knew what he was doing; if he

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4. At the pre-argument charging conference, the trial judge "affirmed" both the government's and the defense requests and stated that they would be "covered."

> expressly stated that he was aware that what he was doing was wrong and he needed a license. Or you may consider the facts. Did he do it secretly or by subterfuge or by clandestine methods? You may consider that. Now, as I said the first element is that the defendant must have exported or attempted to export or caused to be exported from the United States of America an article or article listed on the U.S. Munitions Control List. The government must show that the defendant knew that the export was illegal, but it does not have to show that he knew all of the specifics of the law or was a lawyer or ever read the law or even the U.S. Munitions List. All they have to show with regard to the Arms Export Control Act and the regulations -- all they have to show is that he was aware from whatever source that a license was required.

After the judge finished his instructions, which made clear that the jury must find that the petitioner knew that an export license was required,[5] he asked

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5. The court's instruction included the following: "I have reviewed these legal provisons, and I can tell you as a matter of law that if you find that these items are what they are claimed to be, if you find they are in fact what they are claimed to be, then a license or written approval is required. In deciding if these items are the items alleged,

whether either counsel had any exceptions, to which the Assistant United States Attorney stated "None, Your Honor." Defense counsel had no objection pertinent to the present issue.

During the jury's deliberations, one of the jurors submitted written questions to the court,[6] concerning count one, the conspiracy count, and counts three and four, two of the substantive counts under the AECA. As to count three specifically, the juror asked:

> I am having a problem with count three with if Rudy was not sure about getting an export license. Does that show him as guilty? Even

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remember that the government need only prove that they were specifically designed or modified parts of a missile system."

6. The district court permitted the question to come from a particular juror, rather than from the jury as a whole. While no issue arises from this fact, it is certainly unusual and perhaps worthy of disapproving comment from this Court.

> if you say that he was not absolutely sure he needed a license, I know he was told by Major Instruments that he needed an export license. Explain to me or help me on my confusion.

After consultation with counsel, the trial court brought the jury back into the courtroom and answered the part of the question at issue here, as follows:

> Now, I think I told you, I charged you that you should consider all the evidence and any inference that fairly and honestly arises from the evidence, consider all of it; and based upon that you must find that from whatever source that he knew that he could not export it from the country, basically. You do not have to find that he knew all the details of the law, but you do have to find -- it has to be intentional -- that is, he has to know that he cannot export that particular item from the country is basically what it comes down to.
>
> [JUROR WHO ASKED QUESTION] Okay.
>
> [COURT] That he knew that. ...

Thus, in responding to the juror's mid-deliberation question, the judge reinstructed on the mens rea element in

the AECA, incorrectly, and in a way less favorable to the defense. The judge eliminated the requirement that he had included in his initial instructions, to wit, that the jury had to find that the petitioner knew that he needed a license to export the items at issue in the case, reducing the requirement to knowledge that he could not export the items, without having to know the reason why. In this respect, the judge committed plain error requiring reversal.[7]

In responding to the juror's question, the judge had a duty to clear away the confusion by providing an absolutely clear and accurate statement of the applicable law. Instead, the judge failed to answer the question the

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7. The test for reversal would be "plain error," because defense counsel stated that he had "no exception" to the supplemental instruction.

juror asked. "A question from a deliberating jury often represents a pivotal moment in a criminal trial," and a trial judge has a "duty of special care" when responding to a request for "further light on a vital issue" from a confused member of the jury. United States v. Duncan, 850 F.2d 1104, 1115 (6th Cir. 1988). As Justice Frankfurter put it, in the classic statement on the subject:

> Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge. ...
>
> ... Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.

Bollenbach v. United States, 326 U.S. 607, 612-13 (1946). In this case, the trial court's answer to the jury's questions could not have "clear[ed] ... away with concrete accuracy" the jury's evident confusion regarding the knowledge element as applied to inclusion of the domes on the Munitions List -- it did not even address this question.

Moreover, the answer to the juror's question that the judge did give was itself confusing, as well as incorrect. It was confusing because it changed and lessened the proof required of the government on the critical intent element in the applicable statute from that explained in the judge's initial instruction on this point, without directing the jury's attention to the fact that this even constituted a change from the original instruction. Moreover, the

judge used the vague word "basically" twice in the answer, once also saying "what it comes down to." This choice of inexact words fell short of the Bollenbach requirement of "concrete" guidance and implicitly encouraged the jury not to be overly concerned with the exact requirements of the elements of the offense.

Most important, the judge's supplemental instruction was an inaccurate statement of the law that prejudiced the defendant. Under the plain language of the statute, the government does have to prove that the defendant knew that a license was required, and not merely that exportation would be contrary to law, as the judge implied in the mid-deliberation instruction. This Court has yet to consider the meaning of "willfulness" as that term is

used in the AECA, and what the government is required to prove in establishing that element. That statute provides, in pertinent part:

> **(c) Criminal violations; punishment.** Any person who willfully violates any provision of this section ..., or any rule or regulation issued under [this] section ... shall upon conviction be fined for each violation not more than $1,000,000 or imprisoned not more than ten years, or both.

22 U.S.C. § 2778(c) (emphasis added). The incorporated statutory provision with whose violation the petitioner was charged states, in relevant part:

> **(b) Registration and licensing requirements for manufacturers, exporters, or importers of designated defense articles and defense services; exceptions.**
>
> * * *
>
> (2) Except [as provided in inapplicable regulations], no defense articles or defense services designated by the President under subsection (a)(1) [the Munitions List] may be exported ... without a license for such export, issued in accordance with this Act and regulations issued

> under this Act, except [in irrelevant circumstances].

22 U.S.C. § 2778(b)(2).

The plain language of subsection 2778(c) must be followed. The most fundamental requirement of a jury instruction on the elements of a criminal offense is that it comport with statutory language. See, e.g., United States v. Cheek, 498 U.S. --, 112 L.Ed.2d 617 (Jan. 8, 1991); Liparota v. United States, 471 U.S. 419 (1985) (both discussing scienter elements). The supplemental instruction in this case, however, was incorrect under the terms of the AECA. The willfulness element under § 2778(c) relates directly to the "without a license for such export" language of id.(b)(2), because that is the only "provision of this section" that he was accused of "willfully" disregarding in arranging the

exports at issue; mere knowledge that the export was contrary to law in some unspecified way does not satisfy the statutory language. Since the only "duty" involved is the duty not to export without a license, to require knowledge of the legal duty, as the district court initially charged, which the court below approvingly called "trenchant," Appx. A, at 13; 954 F.2d at 161, is to demand knowledge of the licensing requirement. The later, supplemental charge abandoned that statutory element.

Although the question of the government's required proof of willfulness under the AECA (i.e., whether it must prove knowledge that a license is required or that the item is on the Munitions List, or merely knowledge that exportation is prohibited by some law) has become the subject of confusion and

conflict among the Circuits that have considered it. The U.S. Court of Appeals for the First Circuit has rejected the argument that the defendant must know of the licensing requirement or presence of the article on the Munitions List, holding that willfulness under the AECA means that "'defendant must know that his conduct in exporting from the United States articles proscribed by the statute is violative of the law.'" United States v. Murphy, 852 F.2d 1, 7 (1988), cert. denied, 489 U.S. 1022 (1989) (internal citation omitted; see also Appx. A, at 6-7 & n.6; 954 F.2d at 158-59).

The Seventh Circuit in United States v. Beck, 615 F.2d 441 (1980), also had held that knowledge of the licensing requirement need not be proven, but that appears to conflict with the same Circuit's later discussion of the AECA's

criminal intent requirement in United States v. Malsom, 779 F.2d 1228, 1233-35 (1985). In Malsom, evaluating the defendant's argument that there was insufficient evidence of the required criminal intent, the court stated:

> [w]e hold there was more than sufficient evidence for the jury to conclude that the defendants knew that the aircraft parts that were shipped to Libya required licenses and the reason they failed to apply for the licenses was because they were well aware that these shipments violated the United States laws and regulations.

Id. at 1234-35. The holdings in Murphy and Beck are not supported by the statutory language. In Beck the court claimed to rely entirely on the reasoning and holding of United States v. Lizarraga-Lizarraga, 541 F.2d 826 (9th Cir. 1976), which it misinterpreted, and in Murphy the court relied solely on Beck and Lizarraga-Lizarraga.[8] The Beck court

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8. Murphy also cites the Third Circuit's decision under a predecessor statute in

stated that Lizarraga had "held that the defendant need not know that he is specifically required to have an export license." 615 F.2d at 450.

In fact, the court in Lizarraga was neither presented with nor addressed sua sponte whether the government must prove such knowledge. In Lizarraga, the court of appeals reversed a defendant's conviction, agreeing with his argument that the government must prove that he specifically intended to violate the statute and that the jury must be so instructed, rather than being instructed on general intent. 541 F.2d at 827-29. The Fifth and Eleventh Circuits have followed

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United States v. Cahalane, 560 F.2d 601 (3d Cir. 1977), cert. denied, 434 U.S. 1045 (1978), but Cahalane has nothing to say about this issue. See also United States v. Gregg, 829 F.2d 1430, 1437 & n.14 (8th Cir. 1987).

Lizarraga, recognizing that that leading case properly interprets "willfulness" under the Act to "connote[] a voluntary, intentional violation of a known legal duty." United States v. Adames, 878 F.2d 1374, 1377 (11th Cir. 1989); accord, United States v. Davis, 583 F.2d 190, 193 (5th Cir. 1978). The prevailing definition of "willfulness" makes ignorance of the law a defense. See United States v. Cheek, 498 U.S. --, 112 L.Ed.2d 617 (Jan. 8, 1991). Thus, the narrower interpretation of the meaning of willfulness in the AECA that has surfaced in some cases, and was relied on by the government and adopted by the trial court in its supplemental requested instruction in this case, is not a reasoned one.

The Second Circuit in United States v. Jamil, 707 F.2d 638 (1983), another case under the AECA, addressing a

different argument, read the Act to require the government to prove the defendant's knowledge of the licensing requirement. Indeed, in that case, the government apparently took the position that such knowledge is an element of the statute. Id. at 642. The district court had excluded from evidence a tape recording of a conversation involving the defendant, partly on the basis that its probative value was only slight, and the government appealed. The court of appeals rejected the trial court's conclusion, agreeing with the government that the probative value of the tape recording was substantial in that it bore directly on an element of the crimes, to wit, that the defendant "knew the shipment he attempted to send overseas was unlicensed and ... that he knew that it required a license." Id. See also

United States v. Smith, 918 F.2d 1032, 1037-38 (2d Cir. 1990), in which the Second Circuit joins the Ninth, Fifth, Eleventh, and Eighth Circuits in requiring the defendant a "known legal duty" in exporting the weaponry. Since the only "duty" involved is the duty not to export without a license, to require knowledge of the legal duty is to demand knowledge of the licensing requirement.

The factual dispute at trial with respect to Count Three, to which the jury question referred, was whether an Infra-Red Dome that was not made to the precise specifications of a particular U.S. missile did or did not require an arms export license to be sent to Taiwan. There was no dispute whether the petitioner knew a license was required to export something that he knew to be a component of a missile system. The

question's reference to the Major Instruments letter highlights the importance of this question to the jury's verdict in the present case. The tenor of the juror's question was that even though the letter suggested that in the view of the Major Instruments firm a license would be necessary, the petitioner sincerely doubted that their opinion was correct. Whether this mattered is the point on which the jury needed clarity, but the trial court's answer to the question did not provide it.

Moreover, the court's unresponsive answer also negated a correct instruction on the intent element and substituted one which was plainly erroneous. By permitting a conviction if the defendant knew of any illegality, the judge permitted the jury to bypass the controverted points and convict, for example, if it

believed the shipping documents were not truthful. Although the juror's question was focused to count three, in view of the judge's answer it is likely that the jury applied the lessened proof requirement to all of the substantive counts. The supplemental instruction in this case failed to clarify the jury's confusion on a critical point which the initial instructions had not covered. The instruction only rendered unclear and incorrect what had been a clear and accurate. It therefore constituted plain error requiring reversal and a new trial.

The court below sustained the verdict on the basis that while the initial instruction "might have" been "better," the supplemental instruction was not so different as to require reversal. Appx. A, at 16; 954 F.2d at 162. This analysis is belied by the

record. When the judge asked counsel outside of the presence of the jury whether either had any thoughts about the questions, the following discussion ensued:

> [DEFENSE COUNSEL] If I may, your Honor, it seems that, other than the first question, it appears that his confusion is based on how he views the evidence.
>
> [COURT] Yes.
>
> [DEFENSE COUNSEL] I know that is a lot of it, and I do not know how you could really --
>
> [COURT] If he was not sure --
>
> [DEFENSE COUNSEL] -- give him guidance --
>
> [COURT] Well, I think we can answer count three. He has to know that he needs an export license. It does not matter how he knows it, but he has to know that. Would you not say that that is the law?
>
> [AUSA] I would say the law is he has to know it is a violation of the law to send it without a license.
>
> [COURT] Right. Same thing. He has to know. Okay. He has to know that.
>
> [AUSA] I mean, our position would be the Major Instruments letter was enough to put him on notice of that, if that is what he --

[COURT] Maybe it would be safer to try to write out an answer that we can agree on. That might be a safer way to do it. ...

....

[COURT] Well, for count three, we can just say, "The evidence must show that the defendant knew that he needed an export license." I think that is really the bottom line. ...

[AUSA] Your Honor, if I may. With respect to count three, I believe -- and I am looking at the original instruction and the revised instruction in the Beck case and the Murphy case, the instructions have been to establish the willfulness requirement, the government need not show that the defendant knew he needed or lacked an export license; all that needed to be shown was that the defendant was aware of a legal duty not to export. I may be splitting hairs, but I think the cases say he needs to know that he was not supposed to export it. He does not need to know that he specifically needed that licensing, or that he consulted the Munitions List or --

[COURT] All right -- that he knew he could not export it. I guess that is true. All right. Why do you not bring [the jury] back in? I will see if I can answer this.

Thus, at the time the matter was under discussion in the lower court, the prose-

cutor saw a clear distinction between the charge as previously delivered and the one that the court was to adopt as the supplemental instruction; that is why he proposed the change of language.

The defendant's professed doubt as to whether a license was required for the export of the custom-designed infra-red domes was the core of the defense on Count Three and essential to conviction on the other counts as well. The difference between the two formulations, as the prosecutor recognized at the time, was thus potentially highly significant.

The distinction on which the petitioner relies does not focus on "the basis of [his] knowledge," Appx. A, at 17; 954 F.2d at 162, but rather on the content or subject of the knowledge which the jury was told it must find he had. By permitting a conviction if the

defendant knew of any illegality, the trial judge permitted the jury to bypass the controverted points and convict, for example, if it believed the shipping documents were not truthful, which is not within the indictment, although the government offered evidence on that point. Contrary to the holding below, a final, supplemental instruction misstating the intent element of a charged offense is plain error requiring a new trial.

For all these reasons, this Court should grant this petition for certiorari and reverse the judgment of the United States Court of Appeals for the Third Circuit to the extent that it affirmed the petitioner's convictions.

CONCLUSION

For the foregoing reasons, petitioner RUDY YUJEN TSAI prays that this

Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit to the extent that it affirms his convictions for conspiracy and violations of the Arms Export Control Act.

Respectfully submitted,

PETER GOLDBERGER
PAMELA A. WILK
Attorneys for Petitioner

June 10, 1992.

Filed January 21, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1202

UNITED STATES OF AMERICA,

Appellee

v.

RUDY YUJEN TSAI,

Appellant

On Appeal From The United States District Court
For The Eastern District of Pennsylvania
(D.C. Crim. No. 90-00030-02)

Argued: July 31, 1991

Before: BECKER, SCIRICA and ROTH,
Circuit Judges.

(Filed: January 21, 1992)

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APPENDIX A

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OPINION OF THE COURT

BECKER, *Circuit Judge*.

Defendant Rudy Yujen Tsai was convicted by a jury of three counts of violating and one count of conspiring to violate the Arms Export Control Act ("AECA"), 22 USC §§ 778(b)(2) and (c) (1988). The conviction stems from defendant's part in a conspiracy to export to Taiwan certain components of military equipment without the required export license. Defendant was sentenced by the district court for the Eastern District of Pennsylvania pursuant to the United States Sentencing Commission Guidelines ("the Guidelines" or "USSCG"), and he appeals from the judgment of sentence.

Defendant challenges the conviction itself by arguing that (1) the evidence was insufficient to establish that the infra-red domes alleged to have been illegally exported in Count Three of the indictment were items for which an arms export license was required and that (2) the district court erred in its definition of willfulness in a supplemental charge to the jury. We reject both of these claims. We are satisfied that the government's case was sufficient to support the jury's verdict. We also conclude that the court did

not commit plain error when it supplementally instructed the jury that it was sufficient for conviction to find that defendant knew that he could not export the particular item. This is so even though the court's initial instruction implied that defendant had to know specifically about the export license requirement. Because we reject these claims, we will affirm the conviction.

Defendant also challenges his Guidelines-based sentence on several grounds. We reject defendant's contention that the government failed to prove that "sophisticated weaponry" was involved in this case and therefore hold that the district court properly raised the Guidelines offense level from 14 to 22. However, we agree with the defendant that the district court failed to justify its large upward departure from the Guidelines offense level that the district court found applicable under the facts (level 24) to the equivalent of level 29. We reach this conclusion because the facts found at the sentencing hearing placed the offense within the Guidelines "heartland" for the AECA, thus rendering departure inappropriate. Consequently, we will vacate the judgment and remand for resentencing.

The defendant has also argued that even though he was found to be a manager or supervisor in the criminal scheme for which he was convicted, justifying a two-level upward adjustment, see USSCG § 3B1.1(c), he could still qualify as a "minor participant" in the offense, justifying an offsetting two-level downward adjustment. See USSCG § 3B1.2. The government views this position as illogical. We disagree. While we intimate no view on the factual aspects in this matter, we hold that the two adjustments are not

logically inconsistent and that, on remand, the district court should determine whether there is any basis for defendant's contention that he was a minor figure because he was merely carrying out instructions from others.[1]

I. THE RELEVANT FACTS OF RECORD

The relevant facts, viewed in the light most favorable to the government, see *United States v Gonzalez*, 918 F2d 1129, 1132 (3d Cir 1990), may

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1. We shall not dwell at length upon defendant's contention that the district court abused its discretion in not ordering a local medical study to evaluate the degree of disability remaining from defendant's childhood polio and the likely effect on him of long-term incarceration without rehabilitative care. Defendant still wears a leg brace and, in his view, the results of such a study were necessary to determine whether there existed any unusual mitigating factors that might justify a downward departure, or that might temper any upward departure. The district court had extended contact with defendant throughout a four-day trial as well as during the other proceedings in the case and was in a position to evaluate the need for a physical examination. The district court specifically stated that it did not find defendant's condition "extreme." Under these circumstances, we cannot say that the district court abused its discretion in not ordering a local study.

We do note for the benefit of the district judges within this Circuit that Congress has clearly authorized the conduct of local studies (in contrast to medical evaluations at the Bureau of Prisons medical facility in Springfield, Missouri to which defendant was in fact sent after his incarceration) in cases where medical information will be useful in determining the sentence to be imposed. Virtually all the district courts within this Circuit hold court in places where there are ample resources for the conduct of such local studies, and the United States Probation Offices within the Circuit are all knowledgeable about how to make the necessary arrangements.

be summarized as follows. Defendant, a Taiwanese-born, naturalized American citizen, the defendant's brother, Tommy Tsai, and Dr. David Rosen were involved in an enterprise known as TRT International Corporation ("TRT"), headquartered in Boston. Tommy Tsai founded TRT, apparently in part to facilitate the illegal export of weapons to Taiwan. In 1987, Tommy Tsai began working from Taiwan, and defendant began directing export of the weapons from the United States. As part of the scheme, defendant instructed Rosen to represent himself falsely to suppliers of military equipment as a doctor of engineering and as TRT's director of research. This was part of TRT's plan to procure United States military technology for export to Taiwan. Defendant would receive facsimile ("fax") messages from Taiwan and instruct Rosen which military technology to obtain based on the information contained in the messages.

In early 1987, Rosen, at defendant's direction, began searching for DSU-15 optical receivers, which are prisms used in the proximity fuse of the guidance system of the 9-M Sidewinder, an air-to-air missile. Rosen located Pennsylvania Optical Company, a defense subcontractor in Reading, Pennsylvania, and at defendant's direction sought quotations for prices on behalf of TRT for 5,000 optical receivers.

In March 1987, Rosen purchased from TRT ten of these optical receivers, and shipped them without an export license to the Chung Shan Institute of Science and Technology in Taiwan, the top military research center of the Taiwanese government. They were paid for by a check signed by defendant. Taiwan had sought to obtain the

DSU-15 optical receiver through official channels, but the United States had refused to release the technology.

Next, defendant obtained specifications from Chung Shan for the purchase of infra-red domes. The infra-red dome apparently serves as a "windshield" for the guidance of infra-red military missile systems such as the Sidewinder missile or the Maverick missile. The domes were to be manufactured to military missile specification. Rosen gave the dome specifications to Pennsylvania Optical. Suspicious that TRT was illegally shipping defense articles to Taiwan, Pennsylvania Optical notified United States Customs. As a result, the Customs Service placed an undercover agent at Pennsylvania Optical posing as a salesman handling the TRT account.

Around the same time that the agent was installed, defendant contacted Pennsylvania Optical to request delivery of the infra-red domes. There was evidence that during the next year, defendant exported three infra-red domes and an additional DSU-15 optical receiver to Taiwan.[2] Defendant used a system of falsifying shipping documents and letters of credit to smuggle the defense articles through Customs. Evidence at trial suggested that the domes were defense articles. The government produced John Shepherd, head of the office of Advanced Development for the Sidewinder missile system at the U.S. Naval Weapons Center in China Lake, California, who

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2. The additional optical receiver was delivered by an undercover Customs agent on January 31, 1989 and, according to defendant's statement to Rosen, was taken by defendant's girlfriend to Taiwan.

testified that the infra-red domes were critical to operation of a missile. Based on factors such as flight velocity, wave-length transmission, and flight altitude, he opined that the dome specifications supplied by defendant were military and not commercial in nature. In an exchange relied on by defendant, when Shepherd was asked if the dome was for a military missile, he replied, "Yeah, I would think so."

Additionally, Michael Danis, an advisor to the President on the missile systems of China and Taiwan, testified that the infra-red domes manufactured by Pennsylvania Optical at defendant's request "would be used on infra-red guided missiles, a missile such as the AIM-9M [Sidewinder] or air-to-surface missiles such as the AGM-65 Maverick missile." Danis added that Taiwan is attempting to develop similar infra-red domes for use in its missile program. The government also produced a Department of State certification that the infra-red domes required a license for export pursuant to 22 USC § 2778.

Defendant claimed at trial, however, that he believed that export of the domes did not require a license because the dome was not of custom design and was not part of a United States military weapons system. According to defendant's evidence, the domes have multiple uses. Although they are similar to those used in the infra-red Maverick Missile, they are not identical, and may have been for some other kind of missile. Also, as Rosen testified, the domes can be used for "fleer systems" on helicopter mount support, i.e. on units mounted on platforms atop a helicopter for identification of aircraft. However, the government adduced evidence that defendant knew that he

needed an export license to export these items. A Pennsylvania Optical official told defendant that the infra-red dome required a license. So apparently did Rosen, at least on one occasion. Rosen testified that he "knew that export licenses were needed for the domes," and that he had discussed the need for a license with defendant.

Moreover, defendant made a number of damaging statements in taped conversations with the undercover agent. He said that he would have to apply for an export license, and he told the agent that they should both "act dumb" about the need for a license so that he could always claim ignorance on the subject. The agent then sent defendant a letter detailing the need for the export license.

Defendant sought to exculpate himself by explaining that he was acting under time constraints because of the imminent shipping date for the domes and of the covering letter of credit. He also testified that he thought that the Customs Service would return the items if they were not exportable, since the package was accurately labeled. The jury obviously was not swayed by these arguments (or by defendant's other arguments) and found defendant guilty on all four counts. This timely appeal followed.

II. SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE CONVICTION ON COUNT THREE

Defendant argues that the proof presented by the government at trial was insufficient as a matter of law to establish violation of AECA as charged in Count Three of the indictment because the evidence was unclear as to whether the

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infra-red domes exported on November 22, 1988 were "defense articles" within the meaning of 22 USC § 2278(b). AECA makes it unlawful to violate "wilfully" any provision of AECA or any rule or regulation issued under it. See 22 USC § 2278(c) (1988). Section § 2778(b)(2) prohibits the export of "defense articles" that have been so designated by the President. The Munitions List, contained in 22 CFR § 121.1 (1991), was promulgated pursuant to 22 USC § 2778 (a)(1) and lists twenty-one categories of weapons whose export is prohibited without a license. Category IV(h), the only one on which the jury was charged, includes "all specifically designed or modified components, parts, . . . [and] accessories . . . for the articles in this category." The category includes launch vehicles, guided missiles, rockets, torpedoes, and mines.

We have set forth in Part I, the facts bearing on defendant's legal sufficiency argument. We apply the familiar standards that, in this context, the facts must be viewed in the light most favorable to the government and the conviction cannot be set aside unless the facts adduced were insufficient to permit the jury to find the defendant guilty beyond a reasonable doubt. See *United States v Gonzalez*, 918 F2d 1129, 1132 (3d Cir 1990); *Government of the Virgin Islands v Williams*, 739 F2d 936, 940 (3d Cir 1984).

Defendant argues that the evidence was insufficient on the question whether the infra-red domes were "missile parts," a characterization that would place them within the regulations promulgated pursuant to the AECA. Defendant highlights the countervailing evidence he offered at trial that the domes were to be used on helicopter

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fleer systems. In his sharpest thrust, defendant states:

> "Similar" items, whatever that may be, particularly if they are "fleer systems" for helicopters, are not listed missile components, as alleged, and Shepherd['s] somewhat tentative acquiescence to a leading question, containing a premise not found elsewhere in his testimony (that the domes were for a missile), cannot carry the government's burden beyond a reasonable doubt.

Defendant characterizes Shepherd's confirmation that the domes were missile parts ("Yeah, I would think so") as "somewhat weak."

Although the question focused on by the defendant was leading, defense counsel did not object and the question stands. While Shepherd's response was less than authoritative, the answer was not stricken, and the evidence was before the jury to believe or disbelieve. Moreover, there was other testimony by Shepherd and by Danis that directly linked the domes to missiles. This evidence, coupled with the State Department certification, was more than sufficient to establish defendant's need for an export license. Finally, the evidence of statements to defendant by Rosen and by the Pennsylvania Optical officials, and the statements by defendant on the undercover tape supplied sufficient evidence of defendant's knowledge of the requirement. Under the applicable standards of review, there was sufficient evidence to uphold the conviction on Count Three.

III. THE JURY CHARGE

The AECA violations with which defendant was charged in Counts Two through Four require a showing of willfulness. See 22 USC § 2778(c). In its original jury charge, given in accordance with the tenor (though not the precise terms) of the government's own request for instructions, the district court made it clear that the jury must find that the defendant knew that an export license was required.[3] In a supplemental instruction, given in response to a juror's question, however, the court arguably diluted the original instruction and told the jury that what it had to find was that defendant knew that he could not export that particular item.[4]

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3. In relevant part the court stated:

> Now, as I said, the first element is that the defendant must have exported or attempted to export or caused to be exported from the United States of America an article or article listed on the U.S. Munitions Control List. The government must show that the defendant knew that the export was illegal, but it does not have to show that he knew all of the specifics of the law or was a lawyer or ever read the law or even the U.S. Munitions List. All they have to show with regard to the Arms Export Control Act and the regulations — all they have to show is that he was aware from whatever source that a license was required.

4. The court answered the juror's question as follows:

> Now, I think I told you I charged you that you should consider all the evidence and any inference that fairly and honestly arises from the evidence, consider all of it; and based upon that you must find that from whatever source that he knew that he could not export it from the country, basically. You do not have to find that he knew all the details of the law, but you do

Defendant maintains that the supplemental charge was confusing in light of the original charge because it altered and "lessened the proof required of the government on the intent element, without directing the jury's attention to the charge." Defendant also complains that the court used the word "basically" twice in its answer and that it also said "what it comes down to." The defendant translates these locutions into the use of "inexact words" that failed to give the jury "concrete" guidance, and "implicitly encouraged the jury not to be overly concerned with the elements of the offense." Finally, defendant asserts that the supplemental instruction was an inaccurate statement of the law that prejudiced the defendant.

Because no objection was interposed to the supplemental instruction, defendant argues that it constituted plain error. Under our jurisprudence, plain error occurs only when there is "egregious error or a manifest miscarriage of justice." *United States v Thame*, 846 F2d 200, 204 (3d Cir 1988). We address each of defendant's objections under this standard.

Defendant's objection to the supplemental charge is couched against his background citation to *Bollenbach v United States*, 326 US 607 (1946), in which Justice Frankfurter wrote:

> Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading,

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have to find – it has to be intentional – that is, he has to know that he cannot export that particular item from the country is basically what it comes down to.

[JUROR WHO ASKED QUESTION] Okay.

the error is not cured by a prior unexceptionable and unilluminating abstract charge. . . .

. . . Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.

326 US at 612-13.

Defendant contends that the court failed the rigorous *Bollenbach* test, and did not exercise a duty of "special care" in responding to a request for "further light on a vital issue" from a confused member of the jury. The government responds that the court initially gave a detailed explanation of the willfulness element required to establish specific intent to violate § 2778, see note 4, and that the court never nullified this trenchant charge but merely refocused it in a manner relevant to the jury issue.

Whatever may be said of defendant's contention in another context, we cannot say that the supplemental charge constitutes plain error on grounds of confusion or imprecision. While it would have been preferable for the court to have been linguistically consistent in the original and supplemental instructions, the differences between the two versions of the instructions were not functionally significant, and certainly did not create a fundamental miscarriage of justice notwithstanding that the supplemental charge was of heightened importance because of its timing.

Nor was the district court insufficiently precise because it used the word "basically" and the phrase "what it comes down to." Responses to a juror's question are generally extemporaneous and ad hoc, and cannot be expected to be delivered in polished prose. The district court's choice of words was understandable and acceptable.[5]

Defendant's most substantial objection to the supplemental charge arises from his contention that the charge lessened the proof requirement of the statute. Defendant submits that the statute requires proof of his knowledge of the licensing requirements, and not merely of his knowledge that exporting the items would be against the law. Defendant argues that the jury may have applied this "lesser proof" standard to all the counts.

The statute provides in relevant part:

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5. Nor are we impressed with the defendant's insinuation that there was error because the court (and both counsel) misunderstood the juror's question. The juror asked:

> I am having a problem with count three with if Rudy was not sure about getting an export license. Does that show him as guilty? Even if you say that he was not absolutely sure he needed a license, I know he was told by Major Instruments that he needed an export license. Explain to me or help me on my confusion.

Defendant argues that by limiting his question to Count Three, which concerned the infra-red domes, what the juror was really asking was whether the government had to prove that the defendant knew the domes were "defense articles" on the United States Munitions List even though they were made to unique specifications and were not identical to any existing missile. We think the district court's interpretation as plausible as that of the defendant. Even if not, we do not believe that a supplemental charge that is non-responsive to the juror's question constitutes plain error.

(c) Criminal violations; punishment. Any person who *willfully violates any provision of this section . . ., or any rule or regulation issued under [this] section* . . . shall upon conviction be fined for each violation not more than $1,000,000 or imprisoned not more than ten years, or both.

22 USC § 2778(c) (emphasis added).

The incorporated statutory provision with which violation defendant was charged states, in relevant part:

(b) Registration and licensing requirements for manufacturers, exporters, or importers of designated defense articles and defense services; exceptions. . . .

(2) Except [for irrelevant exceptions], no defense articles or defense services designated by the President under subsection (a)(1) [the Munitions List] may be exported . . . without a license for such export, issued in accordance with this Act and regulations issued under this Act, except [for irrelevant exceptions].

22 USC § 2778(b)(2).

The defendant relies on a Second Circuit opinion, *United States v Jamil*, 707 F2d 638 (2d Cir 1983), which also construed these provisions, to bolster his position. However, that case was decided on an evidentiary issue, not one relating to the correctness of the charge.[6] The other cases

6. Defendant seizes on language in the *Jamil* court's opinion explaining that a tape recorded conversation involving the defendant was improperly excluded from evidence. The court explained that the evidence was of substantial probative value because it proved that the defendant "knew the shipment he

on this issue favor the government. See *United States v Murphy*, 852 F2d 1, 7 (1st Cir 1988) (rejecting argument that the defendant must know of the licensing requirement or presence of the article on the Munitions List, and holding that willfulness under AECA means that "'defendant must know that his conduct in exporting from the United States articles proscribed by the statute is violative of the law'"); *United States v Beck*, 615 F2d 441 (7th Cir 1980) (same).[7]

Defendant argues that *Murphy* and *Beck* are incorrectly decided and that we should not follow them. In essence, he argues that the statute's plain language requires the government to prove that defendant knew that a license was required, not merely that export would be contrary to law. He also asserts that it would be impossible for a defendant to "willfully violate" a statute of which he was unaware.

The district court might have better instructed the jury had it instructed both times as the defendant suggests; as noted, its initial instruction was of that tenor. But we think it an excess of formalism to suggest that there is a functional difference between the two charges. If the defendant knew that the export was in violation of

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attempted to send overseas was unlicensed and . . . that he knew that it required a license." 707 F2d at 642. In *Jamil*, no question was raised as to whether that fact was required to prove knowledge of the licensing requirement, and the court was not required to make the distinctions involved here.

7. Contrary to defendant's contention, *United States v Malsom*, 779 F2d 1228 (7th Cir 1985), does not, despite its discussion of the sufficiency of evidence in that case, actually decide the issue.

the law, we are hard pressed to say that it matters what the basis of that knowledge was. There may be some cases in which one approach will fit better than the other. Certainly knowledge of the licensing requirement will likely be the focal point in most cases, rendering the dispute somewhat academic. But we think that the court did not err in instructing the jury that it could convict if it found that defendant knew that the export was illegal. See *Murphy*, 852 F2d at 7. Thus, we conclude that the district court's supplemental charge was not error, and consequently we hold that it was not plain error.

IV. THE SENTENCING ISSUES

A. *Was "Sophisticated Weaponry" Involved?*

Section 2M5.2 of the Sentencing Guidelines, entitled "Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License," now modified, provided at the relevant time for two distinct base offense levels for the covered offenses. If "sophisticated weaponry" was involved, the base offense level was 22. Otherwise it was 14. Following a sentencing hearing, the district court found that the optical receivers and infra-red domes constituted sophisticated weaponry,[8] and fixed the base offense level at 22.

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8. The district court stated:

> The particular items were on the list. We had testimony that said that the DSU-15, the optical receiver, was a critical component; and I note in particular that a government which was involved in doing research was unable . . . to produce this item and was attempting to obtain the item. Based upon

Defendant argues that the government failed to prove that these items were sophisticated weaponry, posing the issue as one of law (subject to plenary review), rather than one of fact (subject to a clearly erroneous standard). Defendant argues by way of comparison to other items on the Munitions Control List, and asserts that, by "contemporary military or scientific standards," neither the optical receivers nor the domes satisfy the Guidelines definition of "sophisticated weaponry." Alternatively, defendant argues that if the base offense level is to be selected not on the basis of whether the components are sophisticated weaponry, but rather on the grounds that they are designed for use as part of such weaponry, the Sidewinder missile is still not sophisticated weaponry by contemporary military or scientific standards.

Additionally, defendant attacks the articulated grounds of the district court's decision by arguing that just because Taiwan was interested in copying the DSU-15, it does not necessarily follow that the item was "sophisticated" for "a simple item may have very precise specifications." Finally, arguing that this specific Guideline is ambiguous, defendant appears to ask us to invoke the rule of lenity. See *United States v Behrmann*, 1990 US Dist LEXIS 5658 (DDC).[9]

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that, I do find that sophisticated weaponry was involved.

9. The Guideline has in fact been completely revised. See 1991 Guideline Manual, Appendix C, revision #337, at 159-60. Contrary to the government's contention, the November 1, 1990, version is an entirely different and much stricter rule, not a mere clarification, and it is of no help in construing the applicable Guideline.

The government bears the burden of proving the facts necessary to justify the upward adjustment by a preponderance of the evidence. See *United States v McDowell*, 888 F2d 285, 291 (3d Cir 1989). To meet this burden, the government cites various excerpts from the record. First, it points to trial testimony establishing the DSU-15 optical receiver as the key to the most sophisticated version of the Sidewinder missile. Additionally, one of the government's experts, Danis, testified at the sentencing hearing that "without the unit, the missile does not work." Moreover, Danis stated that Taiwan had unsuccessfully sought to obtain the DSU-15 through official channels, but was denied because release of the component would jeopardize national security if the United States lost control of the technology. According to Danis, the version of the Sidewinder equipped with the DSU-15 constitutes state-of-the-art weaponry reserved for the United States' closest allies, and was deployed during the Persian Gulf War as the allies' most sophisticated air-to-air weapon. We have previously described the nature of the domes. See Section II.

We are satisfied that the government has met its burden. Initially, we agree with the district court that it is sufficient if the item in question is a *component* of a sophisticated weapon or weapons system.[10] That is the more sensible reading of the Guideline since otherwise the enhancement would be inapplicable to a defendant who separately shipped component parts of a sophisticated weapons system. See *United States v Nissen*, 928 F2d 690, 695 (5th Cir 1991). Given

10. On this point we exercise plenary review.

the fact that there was testimony from which the district court could find that the domes and the optical receiver were critical components of the Sidewinder missile, we find that the government met the "weaponry" part of the burden.

Notwithstanding the defendant's protestations, we are also satisfied that the government sufficiently demonstrated that the optical receivers and the domes as well as the Sidewinder missiles themselves are "sophisticated." There is no precise measure of the degree of necessary sophistication. The district court heard extensive testimony about the potential uses of this weaponry and its level of sophistication in comparison with other modern weapons technology. It also heard the testimony of Shepherd and of Danis, described above, that the optical receivers and domes were an integral part of state-of-the-art weaponry.[11] Giving the term "sophisticated" its plain and ordinary meaning, and applying deferential review, we do not think that the district court was clearly erroneous in its finding. See 18 USC § 3742(e) (1988) (scope of review).

B. *The Upward Departure*

The district court determined the applicable Guideline range in this case to be 51-63 months, based on an adjusted offense level of 24 and criminal history score of I. The court departed upward to level 29 and imposed a term of 87

11. The defendant has argued that we should draw an implication about the Sentencing Commission's intent in drawing this Guideline (adverse to the government's position) by comparing the Guideline with the United States Parole Commission's Guideline on the point. We find the analogy unhelpful.

months in prison (the lowest part of the range at level 29).

The district court explained its departure as follows:

> Now, on the issue of departure, I do find, again, by clear and convincing evidence, that this does involve a foreign government. . . . There's just no question about it . . . and I find that huge quantities were contemplated. In considering the quantity and the duration of the offense, I believe that an upward departure is in order, and I find that by clear and convincing evidence; and I will make that upward departure to level 29.
>
> This was not espionage, I agree, but it came very close to it, dangerously close to it. I'm glad the defendant is concerned about his little boy[']s because I'm concerned about a lot of little boys, too, who are in our armed forces; and I don't think in good conscience I [can] do otherwise than I've done today.[12]

The principles governing departures are by now familiar. If the Commission already included punishment for the same conduct in the Guidelines' base level, then departure based on the same conduct is inappropriate:

> A district court must sentence within the applicable guideline range unless the court finds that there exists an aggravating or mitigating circumstance of a kind or to a degree not taken into consideration by the Sentencing Commission

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12. The district court apparently applied the clear and convincing standard of proof. See *United States v Kikumura*, 918 F2d 1084 (3d Cir 1990).

> in formulating the guidelines that should result in a sentence different from that described.

United States v Kikumura, 918 F2d 1084, 1098 (3d Cir 1990)

The Guidelines amplify as follows:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

USSCG, Ch 1, Pt A, intro, 4(b) (1988).

The threshold question in any departure case, thus, is whether the facts, as found by the district court, fall within the "heartland." If so, they are of the type that the Commission considered, excluding departure (absent other grounds). We think that in this case they clearly fall within the heartland. The district court departed, at least in part, on the basis of a concern about national security. But the Guideline itself explicitly assumes some threat to national security from the subject offenses. The application note to the Guideline, now modified, stated:

> The base offense level assumes that the offense conduct was harmful or had the potential to be harmful to a security or foreign policy interest of the United States.

USSCG § 2M5.2, Note 2.

The court apparently chose level 29, at least in part, because it is the level in part 2M of the Guidelines for unauthorized disclosure of top secret classified information.[13] See USSCG § 2M3 through § 2M8 (1988). But where the Guideline already contemplates the potential harm of a crime, the court cannot depart upward by analogy to another crime involving the same potential harm. See generally *Kikumura*, 918 F2d at 1098 ("[I]f the circumstances relied upon by the district court to justify the departure were adequately considered by the Sentencing Commission then its decision to depart must be reversed.").

In short, this case falls within the heartland because the Commission, in establishing the Guideline range, considered that the offense was potentially harmful to national security or foreign policy interests. Nothing in the record suggests that defendant's acts were harmful in a way that the Sentencing Commisssion did not contemplate.[14]

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13. Although in the portion of its sentencing remarks immediately prior to announcement of the departure the court did not mention espionage, it did make explicit reference to that offense at the conclusion of its remarks. See p __ [typescript at 21]. Under the teaching of *Kikumura*, see 918 F2d at 1112, analogy is an appropriate basis for departure, and we think it fair to conclude that the district court factored the espionage analogy into its departure decision. This is especially true given that the court departed to level 29, the level under the espionage guidelines for disclosing top secret information. See USSCG § 2M3.3.

14. The district court's comment about our young men fighting at the time of the sentence in the Gulf War was understandable, but inappropriate here, and certainly not a basis for departure.

Further, the district court's analogy to espionage was drawn too bluntly. There was no evidence that the weaponry involved here was top secret or classified. Moreover, the Guideline involved already adjusts the base level for sophisticated weaponry. Thus, even if the Sentencing Commission had not contemplated the potential harm to national security, the analogy that the district court drew to top secret information, which it apparently equated with sophisticated information, was unsupported by the evidence and cannot be affirmed.

Finally, the court thought that the supposedly large quantity of commerce involved justified its upward departure, because the Guideline involved specifically provided for a guided departure based on "the volume of commerce involved." See USSCG § 2M5.2, Note 2. However, the Guideline section at issue contains its own more rigorous requirement for upward departure. Application Note 2 to Guideline 2M5.2, applicable at the time these offenses were committed, provided that:

> [T]he court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. *Where such factors are present in an extreme form, a departure from the guidelines may be warranted.* (emphasis added.)

Thus, the amount of commerce involved would have to be extreme to justify an upward departure.

No evidence suggests that the volume and scope of exports involved in this case were extremely large. The government relies on the fact that

defendant requested a price for 5,000 DSU-15s and said on the undercover tape that he wanted to purchase "huge quantities" of optical receivers. But the government did not show that defendant placed orders for any such quantities or that he either could or would have. Although 5,000 DSU-15s would be a large quantity of sophisticated weaponry, no evidence demonstrated that that amount or any amount greater than the 11 DSU-15s that were actually exported was within the organizational capability of the defendant and his co-conspirators. Nor was the extent of planning and sophistication involved in defendant's scheme sufficient to justify departure. Finally, the conspiracy was not unduly long.

We conclude that the district court departed upwards inappropriately because it increased the sentence based on a factor that the Sentencing Commission had already included in the base offense. Also, there is no basis for a guided departure, see USSCG, Ch 1, Pt A (4)(b), either because the volume of commerce involved was insubstantial or for any other reason. Therefore, the sentence must be vacated and the case remanded for resentencing. See 18 USC § 3771 (1988).

C. *The Requested Downward Adjustment for Less Than Average Culpability*

The district court adjusted the offense level upward two levels under USSCG § 3B1.1(c) because defendant was a manager or supervisor of the involved criminal conduct. The court explained this ruling as follows:

> [C]onsidering all the evidence, particularly the evidence at trial, . . . as I sat through listening to those tapes in this courtroom, number one, there was absolutely no question that the Defendant was guilty, that he knew what he was doing was wrong, he even said so in one of the tapes, and that he was in a managerial level. He made the telephone calls. He was persistent in making those calls. He made arrangements. He was the boss when Tommy, who is now a fugitive, was not present. I'm well aware that there were others in the scheme. His dealings were with people in another country; and they, of course, are not on trial her[e] today. Based upon all of that, I would have to say . . . that he was in a position to exercise decision-making authority. We heard him do it on the tapes. Based on the nature and scope of his activity, . . . and based upon the degree of his participation in the planning and the organization, I again find by clear and convincing evidence that he does qualify for the two level increase because of his managerial role in this offense.

As the defendant himself concedes, these findings, although disputed, are not clearly erroneous.

Defendant contends, however, that the district court erred in not offsetting these points with a corresponding two-point reduction under USSCG § 3B1.2(b), because defendant also qualified as a "minor participant" in the offense. Defendant submits that on facts like those present here, aggravating and mitigating roles in the offense, as defined by the Guidelines, can coexist, and that where they do, they should be deemed to cancel

each other out. The government disagrees and asserts a "logical inconsistency."

Defendant submits that the evidence shows that his brother, Tommy Tsai, was the scheme's leader and that, whenever his brother was present, defendant deferred to his authority. In essence, defendant contends that his role was to carry out instructions that he received by fax from Taiwan, even when he acted alone. While not denying that he was more culpable than Rosen, defendant asserts that he was less culpable than his brother and the officials of the Chung Shan Institute of Science and Technology who sought to acquire United States military technology.

The Guidelines define a "minor participant" as one who is "less culpable than most other participants, but whose role could not be described as minimal." USSCG § 3B1.1, note 3. According to the application note, the "participants" that must be considered in this comparison include all those who were "criminally responsible for the commission of the offense, but . . . not . . . convicted." Id at note 1.[15]

The district court apparently assumed that because it had (properly) found that there could be an upward adjustment for role in the offense, there could be no downward adjustment for less than average culpability.[16] This assumption is

15. The Guidelines provide for a four-level reduction for a "minimal participant," but defendant makes no claim to that status.

16. Defendant raised the argument at his sentencing hearing that the upward adjustment for his role in the offense should be mitigated by a downward adjustment for less than average culpability but the district court, although not explicitly addressing the argument, sentenced defendant in accord with

incorrect. Nothing in the Guidelines or in th enabling legislation, the Sentencing Reform Act, 1 USC § 3551 to § 3585 (1988), compels tha conclusion. We, of course, intimate no view as t whether, under the facts, the defendant is entitle to such a downward adjustment, but the distric court should consider the matter on remand.

While the judgment of conviction itself will b affirmed, the judgment of sentence will be vacate and the case remanded for further proceeding with respect to sentencing consistent with thi opinion.

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the government's theory that such a "washout" was logical impossible..

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1202

UNITED STATES OF AMERICA

vs.

RUDY YUJEN TSAI, Appellant

(D.C.Criminal No.90-00030-02)
ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF PENNSYVANIA [sic]

Present: BECKER, SCIRICA and
ROTHH [sic], Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel July 31, 1991.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court [sic] March 6, 1991, be, and the

same is hereby affirmed insofar as the conviction and vacated insofar as the sentence imposed and the cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:
s/Sally Mrvos
Clerk

RECEIVED AND FILED
1-21-92
SALLY MRVOS
Clerk

Dated: January 21, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1202

UNITED STATES OF AMERICA,

Appellee

v.

RUDY YUJEN TSAI,

Appellant

(D.C. Crim. No. 90-00030-02)

Present: BECKER, SCIRICA and ROTH,
Circuit Judges.

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is DENIED.

BY THE COURT:

s/Edward R. Becker
Circuit Judge

DATED: MAR 17 1992

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

91-1202

UNITED STATES OF AMERICA

vs.

RUDY YUJEN TSAI, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 25, 1992.

s/Edward R. Becker
Judge

Dated: MAR 23 1992

APPENDIX D